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No. 567

# IN THE SUPREME COURT OF THE UNITED STATES,

October Term, 1965

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THE GEORGE F. HAZELWOOD COMPANY,
A MARYLAND CORPORATION,

*Appellant,*

vs.

J. STANLEY PITSENBARGER, ASSESSOR
OF PENDLETON COUNTY, WEST VIRGINIA,

*Appellee*

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ON APPEAL FROM THE SUPREME COURT
OF APPEALS OF THE STATE
OF WEST VIRGINIA

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# JURISDICTIONAL STATEMENT

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Joseph A. Blundon,
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Attorneys for the Appellant

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## INDEX


TABLE OF AUTHORITIES - - - - ii

OPINIONS BELOW - - - - - - 1

JURISDICTION - - - - - - - 1

STATUTE INVOLVED - - - - - 3

QUESTIONS PRESENTED - - - - 4

STATEMENT OF FACTS - - - - - 5

THE QUESTIONS ARE SUBSTANTIAL 7

CONCLUSION - - - - - - - - 14

---

APPENDIX "A"—Final Order and Findings of Fact of the Circuit Court of Pendleton County, West Virginia - - - - - 15

APPENDIX "B"—Opinion of the Supreme Court of Appeals of West Virginia filed April 6, 1965 - - - - - - - 20

APPENDIX "C"—Order of the Supreme Court of Appeals of West Virginia entered April 6, 1965 - - - - - - - - 33

APPENDIX "D"—Final Order of the Supreme Court of Appeals of West Virginia entered July 19, 1965 - - - - - - 35

## TABLE OF AUTHORITIES

**Central Railroad Company of Pennsylvania v. Pennsylvania,** 370 U.S. 607, 8 L.Ed.2d 720, 82 S.Ct. 1297 (1962) - 3, 11

**Esso Standard Oil Co. v. Evans,** 345 U.S. 495, 97 L.Ed. 1174, 73 S.Ct. 800 (1953) 3

**Frick v. Pennsylvania,** 268 U.S. 473, 69 L.Ed. 1058, 45 S.Ct. 603, 42 ALR 316 (1925) - - - - - - - - - - 11

**Kern-Limerick, Inc. v. Scurlock,** 347 U.S. 110, 98 L.Ed. 546, 74 S.Ct. 403 (1954) - - - - - - - - - - 3

**Ott v. Mississippi Barge Line Company,** 336 U.S. 169, 93 L.Ed. 585, 69 S.Ct. 432 (1949) - - - - - - - - - 11

**Standard Oil Co. v. Peck,** 342 U.S. 382, 96 L.Ed. 427, 72 S.Ct. 309, 26 ALR2d 1371 - - - - - - - - - - - 3, 12

**The George F. Hazelwood Company v. Pitsenbarger,** ——— W.Va. ———, 141 S.E.2d 314 (1965) - - - 1, 8, 13

**Union Refrigerator Transit Co. v. Kentucky,** 199 U.S. 194, 50 L.Ed. 150, 26 S.Ct. 36, 4 Ann.Cas. 493 (1905) - 9, 11

**United States v. Allegheny County,** 322 U.S. 174, 88 L.Ed. 1209, 64 S.Ct.908 (1944) - - - - - - - - - - 3

---

Article 81, Section 31 (c) of the Annotated Code of Maryland of 1957, Vol. 7 (The Michie Co.) - - - - - - - 9

## OPINIONS BELOW

The Circuit Court of Pendleton County, West Virginia, which was the first court of record to take cognizance of this proceeding, did not file any formal opinion herein. A copy of its final order, which contains its findings of fact, is set forth in Appendix "A" **infra.** The opinion of the Supreme Court of Appeals of West Virginia, reversing the judgment of the Circuit Court, is unofficially reported in 141 S.E.2d 314, and is also set forth in Appendix "B" **infra,** p. 20.

## JURISDICTION

This proceeding was first brought by petition filed by appellant in the County Court (Board of County Commissioners) of Pendleton County, West Virginia, under Chapter 11, Article 3 of the Official Code of West Virginia (1931). Appellant sought a refund of **ad valorem** personal property taxes allegedly unlawfully assessed and collected by the Assessor of Pendleton County, West Virginia, for the first half of the year 1962, and also sought to obtain exoneration from the second half of such taxes. Appellant argued (R. 20) that Chapter 11, Article 3, Section 1 of the Official Code of West Virginia, as amended by Chapter 142 of the Acts of the West Virginia State Legislature, Regular Session, 1961, and as applied by the Assessor to the facts of this case, was repugnant to the "due process" clause of the Fourteenth Amendment to the Constitution of the United States and invalid. The

County Court refused the relief sought by appellant (R. 21), and appellant appealed to the Circuit Court of Pendleton County. After hearing, the Circuit Court reversed the ruling of the County Court on the ground, among others, that the action of the Assessor was "in violation of the 'due process' clause of the Fourteenth Amendment to the Constitution of the United States." (R. 40) (See Appendix "A", **infra**, p. 18)

The Assessor appealed to the Supreme Court of Appeals of West Virginia, which reversed the judgment of the Circuit Court and entered judgment against appellant April 6, 1965 (see Appendix "C" **infra**). A Petition for Rehearing was filed by appellant on May 5, 1965, and was refused by the Supreme Court of Appeals of West Virginia on July 19, 1965 (see Appendix "D" **infra**). Both in its original Brief (pp. 13-20) and in its Petition for Rehearing and Note of Argument in support thereof (pp. 3-15), appellant again directly and specifically raised the federal constitutional issues hereinafter stated. By its decision, the Supreme Court of Appeals of West Virginia sustained the validity of the statute and the taxes imposed under it for the year 1962, as applied to appellant and of which appellant is complaining. Notice of Appeal to this Court was filed by appellant on July 20, 1965, in the Supreme Court of Appeals of West Virginia.

Jurisdiction to review a judgment of the highest court of a state by appeal, in cases

where a state statute is drawn in question as repugnant to the Constitution of the United States, and where the decision of the highest court of that state is in favor of the validity of the statute, is conferred on this Court by 28 U.S.C.A. sec. 1257(2) and sec. 2101(c). That such jurisdiction exists under the circumstances of this case is shown by the following decisions of this Court: **Central Railroad Company of Pennsylvania v. Pennsylvania,** 370 U.S. 607, 8 L.Ed.2d 720, 82 S.Ct. 1297 (1962); **Kern-Limerick, Inc., v. Scurlock,** 347 U.S. 110, 98 L.Ed. 546, 74 S.Ct. 403 (1954); **Standard Oil Co. v. Peck,** 342 U.S. 382, 96 L.Ed. 427, 72 S.Ct. 309, 26 ALR2d 1371 (1952); **Esso Standard Oil Co. v. Evans,** 345 U.S. 495, 97 L.Ed. 1174, 73 S.Ct. 800 (1953); **United States v. Allegheny County,** 322 U.S. 174, 88 L.Ed. 1209, 64 S.Ct. 908 (1944).

## STATUTE INVOLVED

Chapter 11, Article 3, Section 1 of the Official Code of West Virginia (1931) as amended by Chapter 142 of the Acts of the West Virginia State Legislature, Regular Session, 1961, insofar as relevant herein, is as follows:

**"Time and Basis of Assessments; True and Actual Value; Default; Reassessment; Special Assessors.**—All property shall be assessed annually as of the first day of July at its true and actual value, that is to say, at the price for which such property would sell if voluntarily offered for sale by the owner

thereof, upon such terms as such property, the value of which is sought to be ascertained, is usually sold, and not the price which might be realized if such property were sold at a forced sale, except that the true and actual value of all property owned, used and occupied by the owner thereof exclusively for residential purposes and upon farms occupied and cultivated by their owners or bona fide tenants shall be arrived at by giving primary, but not exclusive, consideration to the fair, and reasonable amount of income which the same might be expected to earn, under normal conditions in the locality wherein situated, if rented. The taxes upon all property shall be paid by those who are the owners thereof on that day, whether it be assessed to them or others . . ."

## QUESTIONS PRESENTED

1. Whether or not Chapter 11, Article 3, Section 1 of the Code of West Virginia, as amended by Chapter 142 of the Acts of the West Virginia State Legislature, Regular Session, 1961, and as applied to The George F. Hazelwood Company, a Maryland Corporation, by the Assessor of Pendleton County, West Virginia, pertaining to **ad valorem** personal property taxes for the year 1962, on the facts shown by the record herein, is repugnant to and invalid under the provisions of the "due process" clause of the Fourteenth Amendment to the Constitution of the United States?; and

2. Whether or not the State of West Vir-

ginia may, within limitations imposed by the "due process" clause of the Fourteenth Amendment to the Constitution of the United States, impose an **ad valorem** tax for a particular year on tangible personal property of a resident of another state if such property is not located in the State of West Virginia at any time during the year for which the taxes are imposed, and is in fact located, assessed and taxed in the state of the taxpayer's domicile during all of such year?

## STATEMENT OF FACTS

The George F. Hazelwood Company, appellant, is a corporation organized and existing under the laws of the State of Maryland, with principal offices and place of business in the City of Cumberland, Allegany County, Maryland. During part of the year 1960 and most of the year 1961, appellant was engaged in construction contracting work for the United States Navy Department at the Naval Research Project at Sugar Grove, in Pendleton County, West Virginia. In connection with its work, appellant had large amounts of machinery and equipment located in Pendleton County until December of 1961, when its contract was completed and all of such equipment was taken back to Maryland.

Appellant was assessed for **ad valorem** personal property tax purposes by the Assessor of Pendleton County as of December 31, 1960, for the tax year 1961, and subsequently

paid that tax in full. At its regular session, 1961, the West Virginia State Legislature enacted an amendment to Chapter 11, Article 3, Section 1 of the Official Code of West Virginia (1931), moving up the assessment date for **ad valorem** property taxes for the year 1962 and subsequent years from December 31st to July 1st of the year preceding the calendar year for which the taxes are imposed. Under this new statute, the Assessor of Pendleton County sought to assess appellant's machinery and equipment again as of July 1, 1961, for purposes of 1962 taxes, and assessment forms for 1962 taxes were furnished appellant by the Assessor in January of 1962.

By letter dated January 25, 1962, which appears as part of the record herein, appellant notified the Assessor that all of the property had been removed from West Virginia in December of 1961, and objected to the proposed assessment for 1962 taxes (R. 33). Nevertheless, on January 29, 1962, the Assessor made the assessment complained of in this case (R. 33). All of the property giving rise to this assessment was kept at the domicile of appellant in the State of Maryland during the entire year 1962, and appellant was assessed and taxed thereon for the full year 1962 by Maryland (R. 40). No part of this property was in West Virginia at any time during 1962 (R. 40).

## THE QUESTIONS ARE SUBSTANTIAL

This appeal presents one clear-cut and fundamental federal constitutional issue which had never been directly passed upon by this Court or by any other court, state or federal, until the decision of the Supreme Court of Appeals of West Virginia in the instant case. This issue goes to the very essence of the nature of personal property taxation and the very essence of the jurisdiction of states to tax the tangible personal property of residents of other states. For the first time in the history of this country, so far as counsel are aware, the highest court of a state has ruled that such state has the power to assess, levy and collect an **ad valorem** tax for a particular year on tangible personal property of a resident of another state, when such property was not in the taxing state at any time during the year for which the taxes were imposed, and when such property was in fact located, assessed and taxed in the state of the taxpayer's domicile during all of such year. We submit that fundamental principles regarding the jurisdiction of states to tax tangible personal property, which have been applied again and again in the decisions of this Court, compel the conclusion that the tax in question in this case is repugnant to and invalid under the "due process" clause of the Fourteenth Amendment to the Constitution of the United States.

1. One highly significant fact shown by the record in this case is that the West Virginia

taxes here complained of, which were assessed against appellant as of July 1, 1961, were **for the calendar year 1962.** The parties are in agreement as to this point, as shown by their briefs filed in the Supreme Court of Appeals of West Virginia. The Supreme Court of Appeals expressly ruled in this very case, for the first time, that West Virginia **ad valorem** property taxes are and always have been assessed on a calendar year basis, and disapproved a dictum to the contrary in an earlier case, saying:

> ". . . after the Legislature amended the assessment statute in 1961 and placed it on a fiscal year basis, that is, from July 1 until June 30, the tax year still remained on a calendar year basis, in which manner property, both personal and real, had been assessed and taxed for many years, notwithstanding a statement contained in the case of **State ex rel. Johnston v. City of Huntington,** 71 W.Va. 106, 76 S.E. 142." See 141 S.E.2d 314, 317 and Appendix "B", **infra** pp. 25-26.

and,

> "Therefore the assessment made by the assessor of Pendleton County on the personal property of the Hazelwood Company located in Pendleton County on July 1, 1961, was for the tax year 1962. The tax assessed on this property December 31, 1960, and paid in full was for the year 1961." **Ibid.**

It is likewise undisputed that the taxes which

were assessed against appellant on this same personal property by Maryland as of January 1, 1962, were also **for the calendar year 1962.** Article 81, Section 31 (c) of the Annotated Code of Maryland of 1957 (Vol. 7 Michie's Ann. Code of Md. of 1957), under which appellant was assessed with and paid 1962 taxes thereon, is as follows:

> "(c) All State, county and/or city taxes required to be levied upon assessments made by the State Tax Commission, and **all State, county, municipal and other local taxes on tangible personal property by whomsoever assessed shall be levied for the calendar year and as of the first day of January of such year** as the date of finality." (emphasis supplied)

2. **Union Refrigerator Transit Company v. Kentucky,** 199 U.S. 194, 50 L.Ed. 150, 26 S.Ct. 36, 4 Ann. Cas. 493 (1905), involved a Kentucky property tax levied on 2000 railroad cars owned by a Kentucky corporation which were leased out for use on various railroads all over the United States, as well as in Canada and Mexico. The evidence showed that only a few of those cars were in Kentucky at any time during the tax years involved, but the Court of Appeals of Kentucky upheld the validity of the tax on all 2000 cars. This Court reversed the judgment and held that, on these facts, the tax was invalid as repugnant to the "due process" clause of the Fourteenth Amendment to the Constitution of the United States, saying:

"The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares, such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children. If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another state, to which it may be said to owe an allegiance, and to which it looks for protection, the taxation of such property within the domicile of the owner partakes rather of the nature of an extortion than a tax, and has been repeatedly held by this court to be beyond the power of the legislature, and a taking of property without due process of law." **Id.**, 202, 153.

"It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. Not only is the operation of state laws limited to persons and property within the boundaries of the state, but property which is wholly and exclusively within the jurisdiction of another state receives none of the protection for which the tax is supposed to be the compensation." **Id.**, 204, 153.

"We are of opinion that the cars in question, so far as they were located and employed in other states than Kentucky, were not subject to the taxing power of that commonwealth, and that the judgment of the Court of Appeals must be reversed." **Id.**, 211, 156.

3. In a long series of decisions, culminating in **Central Railroad Company of Pennsylvania v. Pennsylvania,** 370 U.S. 607, 8 L.Ed.2d 720, 82 S.Ct. 1297 (1962), this Court has held firmly to the rule of the **Union Refrigerator Transit Company** case, **supra.** In the **Central Railroad Company** case, **supra.,** this Court struck down a Pennsylvania property tax assessed against a Pennsylvania corporation insofar as the same applied to certain railroad cars which were shown to have been located in New Jersey throughout the tax years involved, as constituting a taking of the taxpayer's property without due process of law. See also **Frick v. Pennsylvania,** 268 U.S. 437, 487-496, 69 L.Ed. 1058, 1061-1065, 45 S.Ct. 603, 42 ALR 316 (1925), where this Court held that the state of a decedent's domicile may not levy an inheritance tax on tangible personal property owned by the decedent but located in another state.

4. In some cases, such as **Ott v. Mississippi Barge Line Company,** 336 U.S. 169, 93 L.Ed. 585, 69 S.Ct. 432 (1949), this Court has upheld state property taxes where states **other** than the taxpayer's domicile levied taxes based on a percentage of the value of the tax-

payer's tangible personal property equivalent to the percentage of the tax year which such property is shown to have spent within the taxing state, or on some similar reasonable apportionment formula, saying:

> "So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits and protection afforded by the taxing state. (citation omitted) Those requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the state." **Id.,** at 174, 589; see also **Standard Oil Company v. Peck,** 342 U. S. 382, 96 L.Ed. 427, 72 S.Ct. 309, 26 ALR2d 1371 (1952)

This Court also said, in the latter case:

> "The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile. (citation omitted) Otherwise there would be **multiple taxation** of interstate operations and the tax would have no relation to the opportunities, benefits or protection which the taxing state gives those operations." **Id.,** at 384-5, 430 (emphasis supplied)

However, so far as counsel are aware, neither this Court nor any other court, state or federal, had ever held that one state may tax property of a resident of **another state** for a particular year, when such property was not

within the borders of the taxing state at any time during that year, until the decision of the Supreme Court of Appeals of West Virginia herein appealed from.

5. The Supreme Court of Appeals of West Virginia said, in reversing the ruling of the Circuit Court in this case:

> "Although the personal property of the Hazelwood Company has been taxed by **both** West Virginia and Maryland **for the same year,** there is no constitutional inhibition against such taxation." 141 S.E.2d 314, 318 and Appendix "B" p. 29 (emphasis supplied)

and,

> "The State of Maryland had the power to tax the property in question because it was located within its jurisdiction at the domicile of the owner on January 1, 1962, at which time such property was apparently assessed for taxation. West Virginia had the power to tax the same property because it was located in West Virginia on July 1, 1961, which was the time the Legislature had fixed to determine a tax situs in West Virginia for 1962 taxes and had provided that the tax upon such property shall be paid by the owners thereof for property located in West Virginia on July 1, 1961," **Ibid.**

This case presents a clear-cut example of multiple taxation, and the Supreme Court of Ap-

peals of West Virginia has expressly ruled that multiple taxation is permissible on these facts. We submit that the holdings of this Court in the cases above cited and the holding of the Supreme Court of Appeals of West Virginia in the case at bar are in direct conflict. Unless and until this conflict is resolved by this Court, the decision here appealed from will remain among the published reports and will tend to create doubt and confusion among the lawyers, judges and state and local taxing authorities of this country. This is a question of substantial importance, which affects every state, and can be settled only by a decision of this Court, after plenary consideration.

## CONCLUSION

For the reasons above stated, we respectfully submit that, although the amount of money directly involved herein is small, such money has been taken from appellant without due process of law. Moreover, the constitutional questions presented by this appeal are substantial and are of public importance. Therefore probable jurisdiction should be noted and this appeal should be given plenary consideration by this Court.

Respectfully submitted,

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Henry Clay Hart, Jr.

126 East Street
Keyser, West Virginia.
Attorneys for the Appellant

## APPENDIX "A"

### Final Order and Findings of Fact of the Circuit Court of Pendleton County, West Virginia, entered February 4, 1964

This matter came on to be heard this the 4th day of February, 1964, before this Court, the Honorable H. Gus Muntzing, Judge, presiding, and came the George F. Hazelwood Company, a corporation, Petitioner, by Henry Clay Hart, Jr., of Blundon and Hart, as its attorneys, and came also J. Stanley Pitsenbarger, Assessor of Pendleton County, Respondent, in person and by George Sponaugle, Prosecuting Attorney of Pendleton County, West Virginia, and there came on to be heard the Petition of George F. Hazelwood Company, a corporation, Petitioner, in which said Petitioner appeals from a ruling of the County Court of Pendleton County, West Virginia, refusing the Petition filed by Petitioner with said County Court seeking a refund of personal property tax paid by Petitioner for the first half of the year 1962, and seeking abatement of personal property taxes assessed against Petitioner for the second half of the year 1962, on the ground that such taxes were erroneously assessed and collected, as more particularly set forth in said Petition.

It appears to the Court that the entire record of proceedings taken and had before the County Court of Pendleton County has been properly transmitted to this Court for pur-

poses of a hearing on this Petition, and said record, consisting of Petitioner's legally verified Petition filed before the County Court, a Letter of Opinion from the office of the State Tax Commissioner, which was presented to and considered by the said County Court, and the Order of the County Court entered on the 11th day of February, 1963, is now ordered made a part of the record in this Court in this proceeding.

The Court then heard testimony from the following duly sworn witnesses: J. Stanley Pitsenbarger, Assessor of Pendleton County, B. H. Mitchell, Deputy Assessor of Pendleton County, and the parties by counsel examined the said witnesses, all of which was taken down in shorthand characters, and certain stipulations were entered into by counsel for the parties, and the Court heard argument of counsel, all of which are now ordered transcribed and filed and made a part of the record herein.

From all of the foregoing matters, being maturely considered, the Court makes the following findings:

1. Petitioner is a corporation duly organized and existing under the laws of the State of Maryland with principal offices and place of business in the City of Cumberland, Allegany County, Maryland, and performed certain work at Sugar Grove, Pendleton County, West Virginia, during the years 1960 and

1961, and had certain items of tangible personal property in Pendleton County, West Virginia, until the month of December, 1961, at which time all of said personal property was removed from said County and State of West Virginia to Allegany and Garrett Counties in the State of Maryland; and

2. Said personal property of the Petitioner was assessed for personal property tax purposes by the Assessor of Pendleton County for the year 1961, and such tax has been paid; and

3. As of July 1, 1961, said Assessor assessed said personal property for the tax year 1962, in accordance with Chapter 11, Article 3, of the Code of West Virginia, as amended by the Acts of the West Virginia State Legislature of 1961, which changed the date of assessment for tax purposes from December 31st to July 1st; and

4. The Petitioner has paid to the Sheriff of Pendleton County the sum of Six Hundred Eighty-four and 38/100 Dollars ($684.38), representing the first half of taxes assessed upon said personal property for the year 1962, and a like amount is claimed by said Assessor to be due, owing and unpaid; and

5. Petitioner's personal property was not located in the State of West Virginia at any time during the year 1962 but was located and also assessed for personal property tax purposes in the State of Maryland for the full year 1962.

The Court is of opinion that in enacting the amendments to the West Virginia property tax law at the 1961 regular session of the Legislature, the Legislature did not intend to create any tax inequality or to impose any special burden on those who might remove personal property from West Virginia during the period from July 1, 1961, to December 30, 1961. In this case the Petitioner paid its taxes to the State of West Virginia for the full year 1961, and removed its property from West Virginia before the end of 1961, such property being assessed and taxed in Maryland for the full year 1962, and having no tax situs in West Virginia during any part of the year 1962. The effect of this assessment on this Petitioner would be to subject its property to double assessment and hence to double taxation with respect to the same period of time, that is to say the year 1961, in violation of the uniform taxation provisions of Article 10, Section 1, of the Constitution of West Virginia, and in violation of the due process clause of the 14th Amendment to the Constitution of the United States.

For these reasons, the Court holds that the assessment of Petitioner's personal property by the Assessor of Pendleton County for the year 1962, upon the facts shown in the record herein, was erroneous and unlawful, and it is, therefore, the order and judgment of the Court that the Sheriff of Pendleton County shall refund to the Petitioner the sum of Six

Hundred Eighty-four and 38/100 Dollars ($684.38), without interest, which has been paid by said Petitioner and that said Petitioner be and it is hereby exonerated from the payment of taxes for the second half of 1962, to all of which the Respondent-Appellee, the Assessor of Pendleton County, objects and excepts.

It is the further order of the Court that execution of this Order shall be stayed for a period of sixty (60) days hereafter to permit the Respondent to prosecute an appeal herefrom to the Supreme Court of Appeals of West Virginia, as the Respondent so desires.

Enter:

/s/ H. G. Muntzing
Judge

## APPENDIX "B"

### Opinion of the Supreme Court of Appeals of West Virginia, filed April 6, 1965

GEORGE F. HAZELWOOD, COMPANY
a Corporation

v.

J. STANLEY PITSENBARGER, Assessor

No. 12360

Supreme Court of Appeals of West Virginia

Submitted Jan. 26, 1965,
Decided April 6, 1965

### SYLLABUS BY THE COURT

1. The Legislature has the power to fix the time at which property within its jurisdiction may be assessed.

2. Personal property that has never been located within a state and over which the state has no power or control, or which is only temporarily within the state, can not be assessed or taxed by such state, but if it has been located within the jurisdiction of a state for a period of time and used therein, may acquire a tax situs and be assessed on any day fixed by the Legislature; and the tax is determined thereby, even though the property is removed from the state before the tax is due or even before it has actually been assessed.

3. Tangible personal property which has acquired a tax situs retains such status until it is removed from the jurisdiction of the state in which it has acquired a tax situs, and the mere intention or determination to move such property is not sufficient for the state in which it was located at the time the tax situs was established and the property assessed to lose its power to tax such property. It must be actually moved before the assessment date fixed by the Legislature.

4. Both the state of the domicile of the owner of personal property and a state in which such property was located can tax the property if it is located in each state on the assessment date fixed by the Legislature even though the tax is for the same year.

5. All property in West Virginia is assessed annually on the first day of July against the owner of the property at that time, but the personal property must be located in the state each year at the time it is assessed.

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George I. Sponaugle, Pros. Atty., Franklin, for plaintiff in error.

Blundon and Hart, Joseph A. Blundon, Henry Clay Hart, Jr., Keyser, for defendant in error.

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BERRY, Judge.

This is an appeal from a judgment of the Circuit Court of Pendleton County, West Vir-

ginia, entered on February 4, 1964, holding that the assessment of personal property owned by the George F. Hazelwood Company, a Corporation, by the assessor of Pendleton County for the year 1962 was erroneous and unlawful, and granting relief prayed for by said corporation for a refund of taxes paid by it on said property for the first half of 1962 and exonerating said corporation from the payment of taxes for the second half of 1962. This Court granted an appeal from said judgment on July 13, 1964, and the case was submitted for decision on arguments and briefs at the January Term.

The George F. Hazelwood Company, a Corporation, the petitioner below, is a foreign corporation organized and existing under the laws of the State of Maryland, with its principal office and place of business in Cumberland, Allegany County, Maryland, and qualified to do business in the State of West Virginia. In 1960 it moved heavy equipment valued at approximately $91,000.00 into Pendleton County, West Virginia. During the year 1960, and almost the entire year of 1961, this Company was engaged in construction work at the Naval Research Project at Sugar Grove, Pendleton County, West Virginia, under a contract with the United States Navy Department. This work was completed, and some time in December, 1961, all of the heavy equipment of the Company was moved back to its principal place of business in Cumberland,

Maryland. The assessor of Pendleton County assessed the personal property of this Company in Pendleton County on December 31, 1960, for 1961 taxes, as required by the laws of West Virginia at that time. The taxes for the year 1961 were paid in full by the Company. At the 1961 Regular Session of the West Virginia Legislature, Code, 11-3-1, dealing with the assessment of personal property, was again amended and provided that all such property should be assessed annually as of the first day of July at its true and actual value, and that such taxes upon all such property should be paid by the owners thereof on that day. Under the provisions of the amended statute in question, the assessor of Pendleton County assessed for 1962 taxes the Hazelwood Company's personal property located on July 1, 1961, in the State of West Virginia. The Hazelwood Company advised the assessor of Pendleton County that all of its personal property had been removed from West Virginia in December, 1961, and objected to the assessment of such property for the year 1962 taxes. Likewise, the Company protested to the State Tax Commissioner who replied that the assessment date, but not the tax year, had been changed. Notwithstanding the objection of the Hazelwood Company to the assessment, such assessment was actually made on said property for 1962 taxes by the assessor on January 29, 1962, for such property as was located in the State of West Virginia on July 1, 1961. All of the Hazelwood Company's

property, consisting of heavy machinery and equipment involved in the assessment by the assessor of Pendleton County, was located and kept in the State of Maryland during the entire year of 1962, and the Hazelwood Company was assessed and taxed thereon for the full year by the State of Maryland. The Hazelwood Company paid to the Sheriff of Pendleton County, West Virginia, the first half of the 1962 taxes in the amount of $684.38, such being its assessment for personal property in West Virginia, and then filed a petition in the County Court of Pendleton County, West Virginia, to obtain a refund for the first half of 1962 taxes paid by it, and for an exoneration from the payment of taxes for the second half of the year 1962.

The hearing was held before the County Court of Pendleton County upon the petition filed therein in connection with this matter, and on February 11, 1963, an order was entered by said Court denying the relief prayed for in its petition.

On March 5, 1963, the George F. Hazelwood Company filed a petition in the Circuit Court of Pendleton County, West Virginia, appealing from the order entered by the County Court of Pendleton County and praying that said order be reversed. On February 4, 1964, a hearing on said petition was held by the Judge of the Circuit Court of Pendleton County and an order was entered reversing the ruling of the County Court of Pendleton

County and holding that even though the personal property of the Hazelwood Company was located in Pendleton County, West Virginia, on July 1, 1961, it had no tax situs in West Virginia during the year 1962, and that it was erroneously and unlawfully assessed. This order directed the sheriff of Pendleton County to refund the first half of the 1962 taxes paid to Pendleton County and exonerated said Company from the payment of taxes on such personal property for the second half of the year 1962.

It is contended in this appeal that the judgment of the Circuit Court of Pendleton County is erroneous and not supported by the law applicable in such cases.

It is the contention of the appellee Hazelwood Company that the Legislature did not intend by the 1961 tax amendment to impose a tax for the calendar year 1962 on property already taxed for 1961 which was not within the state during the year 1962, and if it was so intended, that such tax would be unconstitutional because such property did not have a tax situs in West Virginia during any part of the year 1962, and was, in fact, located, assessed and taxed during such year at the domicile of the taxpayer. It is conceded by the appellee in this proceeding that after the Legislature amended the assessment statute in 1961 and placed it on a fiscal year basis, that is, from July 1 until June 30, the tax year still remained on a calendar year basis, in which

manner property, both personal and real, has been assessed and taxed for many years, notwithstanding a statement contained in the case of **State ex rel. Johnston v. City of Huntington,** 71 W.Va. 106, 76 S.E. 142.

This question is discussed in 60 West Virginia Law Review, on page 271 by Professor Londo H. Brown. It is pointed out there that if taxes are not based on a calendar year after the 1961 tax amendment changing the assessment date, it would result in either an overlapping assessment or a gap of six months in 1962 during which time no taxes could be imposed. It can certainly be said that the Legislature did not intend to have either event occur by virtue of the amendment. Professor Brown's article deals with the taxation of real property under the provisions of Code, 11A-1-2, as amended by the Legislature in 1961, which provides that a lien shall attach on the assessment date, July 1, 1961, and on July 1 of each year thereafter, for the taxes "payable for the ensuing fiscal year." This language is not in Code, 11-3-1, which deals with the assessment of the property and there is no specific section relative to the year for which the taxes on personal property are payable, but the sections are in the same chapter dealing with taxation of personal and real property and should be read together. See Code, 11A-1-1, as amended, which says that "taxes" as used in Chapter 11A refers to both real and personal levies unless otherwise specified. It would not be possible under the pres-

ent law in this state to have two tax years for real and personal property. It is true that there is no lien denominated as such on personal property after assessment thereof for taxation, but Code, 11A-2-3, as amended, provides that the sheriff may distrain for delinquent "taxes" any goods and chattels belonging to a person assessed, and Code, 11A-2-5, as amended, provides for applying the distraint to collect taxes assessed against goods and chattels, even though they have been transferred to another person. It is difficult to see any practical difference between this and a lien.

It would appear that the intention of the amendment to the assessment statute was to give the assessors more time in which to make their assessments in order that they could be completed in time for the use of the levying authorities before the beginning of the fiscal year. The practical effect of this amendment as applied by the officials who are charged with its administration has been to allow the levies and budgets to be made before the beginning of the fiscal year and the collection of taxes to be made two months sooner than they were made before, without any overlap or gap. The interpretation of the amended statute in question dealing with assessment and taxes by the officers whose duty it is to administer it as indicated above should be given great weight in the construction of the statute. 17 M.J., **Statutes,** Section 58. Therefore, the assessment made by the assessor of Pen-

dleton County on the personal property of the Hazelwood Company located in Pendleton County on July 1, 1961, was for the tax year 1962. The tax assessed on this property December 31, 1960, and paid in full was for the year 1961. The exception contained in Code, 11-3-30, as amended, preserving the former law as to 1961, while inaptly expressed, merely means that the law pertaining to assessments and tax payment in effect on January 1, 1961, before the amendment, would be applicable to and govern the assessments already made and taxes yet to be paid for the year 1961. The exception has no bearing on the case at bar because the first assessment was made and the taxes for 1961 accrued following the provisions of the law before it was amended.

It is well settled that a Legislature of a state has the power to fix the time at which property within its jurisdiction may be assessed. 51 Am.Jur., **Taxation,** Section 441; 84 C.J.S. **Taxation** 60; **Hammond Lumber Co. v. Smart,** 129 La. 945, 57 So.277, 38 L.R.A., (N.S.) 856 et seq. Personal Property that has never been located within a state and over which the state has no power or control or which is only temporarily within the state cannot be assessed and taxed by such state, but if it has been located within the jurisdiction of the state for a period of time and used therein it may acquire a tax situs and be assessed on any day fixed by the Legislature and the tax is determined thereby, even though the property is

removed from the state before the tax is due or even before the assessor actually entered his figures. 51 Am.Jur., **Taxation,** Section 442; **San Gabriel Valley Land & Water Co. v. Witmer Bros. Co.,** 96 Cal. 623, 29 P. 500, affirmed on rehearing, 31 P. 588, 18 L.R.A. 465. It has been specifically held that property may be assessed six months before the tax year. **Muskogee County v. United States,** 10 Cir., 133 F.2d 61. Tangible personal property which has acquired a tax situs retains such status until it is removed from the jurisdiction of the state in which it has acquired such tax situs, and the mere intention or determination to move such property is not sufficient to cause the state in which it was located at the time the tax situs was established and the property assessed, to lose its power to tax such property. It must be actually moved before the assessment date fixed by the Legislature. 84 C.J.S. **Taxation** 115; **State v. Crown Central Petroleum Corp.,** Tex-Civ-App., 242 S.W.2d 457.

Although the personal property of the Hazelwood Company has been taxed by both West Virginia and Maryland for the same year, there is no constitutional inhibition against such taxation. Generally, to constitute double taxation there must be an identity of taxing authority, taxing period, taxing purpose, and person and property taxed; and even then there are exceptions resulting from constitutional provisions not necessary to discuss here. 51 Am.Jur., **Taxation,** Sections

284, 285. Many constitutions do not prohibit per se double taxation, and cases striking it down have generally relied on "equal and uniform" clauses.

The State of Maryland had the power to tax the property in question because it was located within its jurisdiction at the domicile of the owner on January 1, 1962, at which time such property was apparently assessed for taxation. West Virginia had the power to tax the same property because it was located in West Virginia on July 1, 1961, which was the time the Legislature had fixed to determine a tax situs in West Virginia for 1962 and had provided that the tax upon such property shall be paid by the owners thereof for property located in West Virginia on July 1, 1961. Code 11-3-1, as amended.

It has been held in a similar case that both the State of Texas, the domicile of the owner of the property, and the state of Louisiana, into which State the property was moved, could tax the personal property, it having acquired a tax situs for the same year. **Griggsby Construction Company v. Freeman,** 108 La. 435, 32 So. 399, 58 L.R.A. 349. This question is discussed in 51 Am.Jur., **Taxation,** Section 450, wherein it is stated: "As a matter of constitutional power, a state which otherwise has the right to tax personal property is not deprived thereof by the fact that the property is subject to taxation, or that a tax has actually been paid thereon, in another state for the same period."

The statutory assessment date determines the taxability of property and not the actual date the assessment is made. **United Telephone Mutual Aid Corporation v. State of North Dakota,** 87 N.W.2d 54.

It is the contention of the appellee that inasmuch as the sole basis for the power of West Virginia to tax the property in question for 1962 is because such property was in West Virginia on July 1 of the preceding year, it would follow that West Virginia could have also lawfully assessed the same property for 1963 taxes on July 2, 1961, and for 1964 taxes on July 3, 1961, and continue so to do for any number of years in the future, regardless of whether the property was in West Virginia the years for which such taxes were assessed. This could not be done because of the wording of the statute pertaining to the assessment of such property. The statute, Code, 11-3-1, as amended, provides that all property shall be assessed annually on the first day of July and the law requires the property to be in the state at the time it is assessed. All property must be assessed annually because the value changes and any attempt to assess property for taxation in future years when the property was not located in the taxing state could not be upheld for many reasons.

It should be pointed out that the property in question was brought into West Virginia in 1960 and was not in West Virginia on December 31, 1959, when assessment was made

on such property and therefore the Hazelwood Company was not assessed or taxed for its personal property in West Virginia during the year 1960. Therefore, it can be seen that the application of the assessment and tax laws in this state, before and after the 1961 amendment tended to equalize and compensate in relation to the taxes in question and was not an unjust burden as asserted by the appellee.

For the reasons stated herein, the judgment of the Circuit Court of Pendleton County is reversed.

Reversed.

## APPENDIX "C"

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 6th day of April, 1965, the following order was made and entered, to-wit:

In the Matter of the George F. Hazelwood Company, a corporation

George F. Hazelwood Co., a corporation,
Plaintiff Below, Defendant in Error

vs. No. 12360

J. Stanley Pitsenbarger, Assessor of Pendleton County,
Defendant Below, Plaintiff in Error

Upon a writ of error to a judgment of the Circuit Court of Pendleton County, rendered on the 4th day of February, 1964.

The Court, having maturely considered the transcript of the record herein and the argument and briefs of counsel thereon, is of opinion for reasons stated in writing and filed with the record that there is error in said judgment. It is therefore considered and ordered by the Court that the judgment of the Circuit Court of Pendleton County rendered in this case on the 4th day of February, 1964, be, and the same is hereby set aside, reversed and annulled, and that the plaintiff in error do

recover of and from the defendant in error his costs about the prosecution of his writ of error in this Court in this behalf expended: all of which is ordered to be certified to the Circuit Court of Pendleton County.

The syllabus of points adjudicated, prefixed to the written opinion prepared by Judge Berry, was concurred in by Judges Browning, Haymond, Calhoun and Caplan.

A True Copy

Attest: KENNETH E. HINES
Clerk Supreme Court of Appeals

## APPENDIX "D"

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 19th day of July, 1965, the following order was made and entered, to-wit:

In the Matter of the George F. Hazelwood Company, a corporation

George F. Hazelwood Company, a corporation,
Plaintiff Below, Defendant in Error

vs. No. 12360

J. Stanley Pitsenbarger, Assessor of Pendleton County, Defendant Below, Plaintiff in Error

The Court, having maturely considered the petition for rehearing and reargument filed in this case, is of opinion to, and doth hereby deny the prayer of the petition, and doth order that the final order entered herein be made absolute and certified as heretofore directed.

A True Copy

Attest: KENNETH E. HINES
Clerk Supreme Court of Appeals

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NO. 567

IN THE

# Supreme Court of The United States

**October Term, 1965**

THE GEORGE F. HAZELWOOD COMPANY,
A Maryland Corporation,
*Appellant,*

VS.

J. STANLEY PITSENBARGER, Assessor of
Pendleton County, West Virginia,
*Appellee.*

ON APPEAL FROM THE SUPREME COURT OF APPEALS
OF THE STATE OF WEST VIRGINIA

## BRIEF FOR THE APPELLEE IN OPPOSITION TO JURISDICTIONAL STATEMENT

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## INDEX


| | Page |
|---|---|
| TABLE OF AUTHORITIES | ii |
| JURISDICTION | 1 |
| QUESTIONS PRESENTED | 5 |
| STATEMENT OF FACTS | 5 |
| THE QUESTIONS ARE SUBSTANTIAL | 6 |
| CONCLUSION | 21 |

## TABLE OF AUTHORITIES

*Central Railroad Company of Pennsylvania* v. *Pennsylvania*, 370 U.S. 607, 8 L.Ed. 2d 720, 82 S.Ct. 1297 (1962) ..... 2

*Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 98 L.Ed. 546, 74 S.Ct. 403 (1954) ..... 3

*Esso Standard Oil Co.* v. *Evans*, 345 U.S. 495, 97 L.Ed. 1174, 73 S.Ct. 800 (1953) ..... 3

*United States* v. *Allegheny County*, 322 U.S. 174, 88 L.Ed. 1209, 64 S.Ct. 908 ..... 3-4

*Standard Oil Co.* v. *Peck*, 342 U.S. 382, 96 L.Ed. 427, 72 S.Ct. 309, 26 ALR 2d 1371 (1952) ..... 4

51 Am. Jur., Taxation, § 442 ..... 6

Cooley on Taxation, Vol. 3, Fourth Edition, § 1062 7

Cooley on Taxation, Vol. 3, Fourth Edition, § 546 8

C.J.S., Section 84, Taxation, § 60 ..... 9

*United Telephone Mutual Aid Corporation* v. *The State of North Dakota and the County of Cavalier*, 87 N.W. 2d 54 ..... 9-10

51 Am. Jur., § 450 ..... 12

*Town of Cady* v. *Alexander Construction Company*, 12 Wis. 2d 236, 107 N.W. 2d 267 ..... 13-14

*The George F. Hazelwood Company* vs. *Pitsenbarger*, 149 W. Va. ....., 141 S.E. 2d 314 (1965) ..... 16-17

*Union Refrigerator Transit Company* v. *Kentucky*, 199 U.S. 194, 50 L.Ed. 150, 26 S.Ct. 36, 4 Ann. Cas. 493 (1905) ..... 19

*Muskogee County* v. *United States*, 133 F. 2d 61 ..... 20

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IN THE

# Supreme Court of The United States

October Term, 1965

THE GEORGE F. HAZELWOOD COMPANY,
A Maryland Corporation,
*Appellant,*

vs.

J. STANLEY PITSENBARGER, Assessor of
Pendleton County, West Virginia,
*Appellee.*

ON APPEAL FROM THE SUPREME COURT OF APPEALS
OF THE STATE OF WEST VIRGINIA

## BRIEF FOR THE APPELLEE IN OPPOSITION TO JURISDICTIONAL STATEMENT

### JURISDICTION

Appellee agrees with the facts as set forth in the second section of appellant's jurisdictional statement entitled "Jurisdiction". Appellee denies that the statute involved (Chapter 11, Article 3, Section 1,

of the Official Code of West Virginia [1931], as amended by Chapter 142 of the Acts of the West Virginia Legislature, Regular Session, 1961), presents a valid question for appeal to this Court.

Appellant contends that the action of the Pendleton County, West Virginia assessor, in assessing a tax upon a large quantity of appellant's tangible personal property having a tax situs in Pendleton County, West Virginia, on the assessment date (July 1, 1961) was in violation of the "due process" clause of the Fourteenth Amendment to the Constitution of the United States because the tax was levied for a period, and was payable at a time after appellant had removed his property from Pendleton County, West Virginia. In support of this position appellant cites five cases previously decided by this court.

*Central Railroad Company of Pennsylvania* v. *Pennsylvania*, 370 U.S. 607, 8 L.Ed. 2d 720, 82 S.Ct. 1297 (1962); involved the right of Pennsylvania to tax all railroad cars owned by a Pennsylvania corporation even though some railroad cars were constantly used in New Jersey and other railroad cars were used by other railroads. This Court held that since the record disclosed a certain number of railroad cars were run on fixed routes and regular schedules in New Jersey, it was possible for such railroad cars to acquire a tax situs in New Jersey, and to that extent such railroad cars could not be taxed in Pennsylvania. In so deciding the Court said:

> "Since the domiciliary State is precluded from imposing an ad valorem tax on any property to the extent that it *could* be taxed by another

> State, not merely on such property as *is* subjected to tax elsewhere, the validity of Pennsylvania's tax must be determined by considering whether the facts in the record disclose a possible tax situs in some other jurisdiction. Had the record shown that appellant's cars traveled through other States along fixed and regular routes, even if it were silent with respect to the length of time spent in each nondomiciliary State, it would doubtless follow that the States through which the regular traffic flowed could impose a property tax measured by some fair apportioning formula. Cf. Braniff Airways, Inc. v. Nebraska State Board of Equalization & Assessment, 347 US 590, 98 L ed 967, 74 S Ct 757. And this would render unconstitutional any domiciliary ad valorem tax at full value on property that could thus be taxed elsewhere. Standard Oil Co. v. Peck, supra (342 US 384)."

In the present factual situation no doubt exists that the tangible personal property of the appellant had acquired a tax situs in Pendleton County, West Virginia, which tax situs was outside the domicile of its owner on July 1, 1961, the day fixed by the West Virginia Legislature for the assessing of all property located within West Virginia. There is no question before this Court concerning the validity of a tax levied by a domiciliary State. If appellant has suffered any injustice, such injustice has been suffered at the hands of the Maryland taxing authorities and not at the hands of the West Virginia taxing authorities.

*Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 98 L.Ed. 546, 74 S.Ct. 403 (1954); *Esso Standard Oil Co.* v. *Evans*, 345 U.S. 495, 97 L.Ed. 1174, 73 S.Ct. 800 (1953); *United States* v. *Allegheny County*, 322 U.S.

174, 88 L.Ed. 1209, 64 S.Ct. 908; cited by the appellant, relate to the right of the State to tax the Federal Government and have absolutely no bearing on the questions being considered.

In *Standard Oil Co.* v. *Peck*, 342 U.S. 382, 96 L.Ed. 427, 72 S.Ct. 309, 26 ALR 2d 1371 (1952), the question involved the right of Ohio to tax barges owned by an Ohio corporation, but which in transporting oil along the Mississippi had little contact with Ohio. Deciding that Ohio could not tax the barges, this Court declared:

> "* * * But they have no application here since most, if not all, of the barges and boats which Ohio has taxed were almost continuously outside Ohio during the taxable year. No one vessel may have been continuously in another state during the taxable year. But we do know that most, if not all, of them were operating in other waters and therefore under Ott v. Mississippi Valley Barge Line Co. 336 US 169, 93 L ed 585, 69 S Ct 432, supra, could be taxed by the several states on an apportionment basis. The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile. See Union Refrigerator Transit Co. v. Kentucky, 199 US 194, 50 L ed 150, 26 S.Ct. 36, 4 Ann Cas 493. Otherwise there would be multiple taxation of interstate operations and the tax would have no relation to the opportunities, benefits, or protection which the taxing state gives those operations."

Again, it is clear that the facts of this case have no relation to the facts now before the Court. The appellant has failed to cite any authority that Chapter

11, Article 3, Section 1, of the Official Code of West Virginia (1931), as amended by Chapter 142 of the Acts of the West Virginia State Legislature, Regular Session, 1961, is violative of the "due process" clause of the Federal Constitution, and, therefore, on that basis appellee opposes consideration of this matter by this Court.

## QUESTIONS PRESENTED

1. Does the State of West Virginia have authority to fix a date upon which all property having a tax situs within the State shall be assessed at its true and actual value, which date precedes the date of actual payment and use of the tax money so raised?

2. When tangible personal property, owned by foreign corporations, has acquired a tax situs in West Virginia, and is located in West Virginia on the date fixed by the West Virginia Legislature for the assessment of all property is removed from West Virginia prior to the period of time for which the tax is levied and paid to the domiciliary State of the property owner, is the "due process" clause of the United States Constitution violated?

## STATEMENT OF FACTS

Appellee is in substantial agreement with appellant's statement of facts except in so far as such appellant states that the tax assessed on July 1, 1961, was assessed for the calendar year 1962. Doubt still exists as to whether the assessment on July 1, 1961, was for the calendar year 1962 or for the fiscal year beginning on July 1, 1962.

## THE QUESTIONS ARE SUBSTANTIAL

### I.

Appellant complains that because its tangible personal property was removed from Pendleton County, West Virginia, after it was legally assessed for tax purposes in West Virginia, but before the taxes were paid it has been denied "due process". Appellant, without protest or argument, paid all personal property tax which had been assessed against it on December 31, 1960. In so doing, appellant admitted that the construction equipment used in performing the construction contract had acquired a tax situs in West Virginia, and, therefore, was subject to the payment of West Virginia personal property tax.

The record reveals that the West Virginia Legislature in 1961 amended the law so as to change the assessment date for the next tax year from December 31 to July 1. In effect, the assessment date was moved back six months, or stated conversely, the assessment date is now six months earlier than before the 1961 amendment.

The following statement concerning the fixing of a date for the assessment of property taxes is found in 51 Am. Jur., Taxation, § 442:

> "While a state cannot fix a taxable situs for property which has never come into the state, and over which it has no power of control, it does have power to fix the time at which property within its jurisdiction may acquire a taxable situs. *In most jurisdictions the annual assessment of property is made as of some fixed day,*

*and the situs of such property is determined as of that day, even if it has been outside the state the greater part of the year or is removed from the state before the tax is due or even has been actually assessed.* This practice, while almost universal, is not based upon a constitutional right. *A state may make the ownership of property subject to taxation relate to any day or days or period of the year it may think proper.* Thus, a state may base its tax upon the average amount of property within the state owned by the taxpayer during the year. And where the taxable situs relates to a day certain in each year, no taxes can legally be assessed and levied for a particular year unless the conditions requisite to liability exist on the day fixed. In some states it is provided that property brought into the state after the day as of which the assessment is made shall be subject to taxation for the current year, and such a statute has been enforced against property brought in from another state and on which a tax had been assessed and paid for the same year. * * *" (Emphasis supplied.)

Regarding this same point, see Cooley on Taxation, Vol. 3, Fourth Edition, § 1062, wherein it is stated:

"* * * The customary regulation is that the assessment shall be made or completed on a certain day, or that it shall be made as of a certain day. This fixes the liability of persons and property to taxation for the year. There are some inconveniences and inequalities resulting from this, but some regulation of the kind is indispensable. A force of tax officers cannot be kept employed for the year in watching the transfers of property, the movements of persons,

and vicissitudes of business, in order to equalize the charges upon them; periodical assessments, if they produce injustice in one case, may correct it in the next, and on the whole are likely to be fair. An any rate, they constitute the best regulation the law can establish. 'In the imposition of taxes, exact and critical justice and equality are absolutely unattainable. If we attempt it, we might have to divide one year's tax upon a given article of property among a dozen different individuals who owned it at different times during the year, and then be almost as far from the desired end as when we started. The proposition is utopian. The legislature must adopt some practicable system;' and this practicable system is found to be the one which has been indicated. Every person is therefore to be taxed for the year upon his personalty, estimated as of the time of the assessment, and every parcel of real estate according to its value as set down in the proper list or roll. Changes in the ownership of property, or in the value after the periods of assessment, cannot be taken notice of in taxation until the time for a new assessment has arrived. * * *"

See also, § 546, as follows:

"* * * There must be some day of the year as of which the power to tax property at all, or the power to tax it to a certain person, is to be determined. That day will fix the power to tax with reference (1) to whether the property was in existence on that date, (2) whether the property was within the jurisdiction so as to have taxable situs on that day, (3) whether the property was exempt from taxation on that day and (4) whether the property should be taxed to one person or another as dependent on its ownership on that day."

In accord with this, see Section 84 C.J.S., Taxation, § 60, wherein it is stated:

> "* * * *Subject to constitutional restrictions, the state may select the time as of when tax liability shall be determined, and the taxable status of persons and property will be determined as of the time specified in the statute.* Unless a legislative act limits the term for taxation, a tax term fixed by statute carries with it the fractional part of the year. *As between the state and the taxpayer, the latter is liable for the taxes on such taxable property as he owned on the day fixed by law for the completion of the assessment*, or, according to the statute, on the day fixed for the filing of taxpayers' lists or schedules, his liability attaching as of that date. * * *" (Emphasis supplied.)

When Appellant brought tangible personal property into this State, Appellant was not guaranteed that the tax assessment date would not be changed by the Legislature. All authorities support the view that the Legislature may change the tax assessment date. Appellant is attempting to claim that merely because Appellant's property did not acquire a permanent situs in this State, it is unfair to change the assessment date; however, Appellant fails to realize that it enjoyed the protection of the laws of this State during the time such property was located in this State, and, therefore, Appellant should be made to contribute to the expenses incident to protecting its property just as all other property owners are required to contribute.

In *United Telephone Mutual Aid Corporation* v. *The State of North Dakota and the County of Cavalier*, 87

N.W. 2d 54, the plaintiff, a mutual aid corporation, contended that the North Dakota Telephone Company, a public utility, should be taxed as a mutual aid corporation rather than as a public utility. The statute in question provided that the tax rates were to be fixed as of January 1 of each year; however, the plaintiff contended that since it had purchased the North Dakota Telephone Company on March 2nd, and the tax was not paid until August, the North Dakota Telephone Company's status should be changed to that of a mutual aid corporation, even though on January 1 it was being operated as a public utility. The Court, in deciding against the plaintiff and holding that the tax liability was fixed as of January 1, the assessment date, declared:

> "This court has had occasion to interpret statutes similar to those we have under consideration. In Gaar, Scott & Co. v. Sorum, 11 N.D. 164, 169, 90 N.W. 799, 800, we said:
>
> > " 'Section 6 and subdivision 10 of section 7, c. 126, Laws of 1897, now known as section 1181, and subdivision 10 of section 1182 Rev. Codes 1899, are as follows: (section 1181): "All property subject to taxation shall be listed and assessed every year at its value on the first day of April preceding the assessment." Section 1182, subd. 10: "Personal property shall be listed and assessed annually with reference to its value on the first day of April." The language of the above sections, when considered alone and independently of certain other provisions of the chapter to which we will hereafter refer, expresses the legislative purpose to fix upon April 1st as a point of time for determining the taxability, ownership, and

> value of both real and personal property for the purposes of taxation. Such was the construction placed upon the provisions referred to by the supreme court of Minnesota in Martin Co. v. Drake, 40 Minn. 137, 41 N.W. 942, decided Jan. 30, 1889, which was prior to their adoption in this state. Mitchell, J., speaking for the court in that case, said: "All tax laws have to fix upon some particular date in the year at which to determine the taxability as well as the ownership and value of property for purposes of assessment and taxation * * *. Every man must pay taxes on what he then owns, and at its then value, no matter how short a time he may have owned it, or how soon thereafter it is lost." '
>
> "Conformable to foregoing opinion and to what we believe is a general rule for the construction of similar assessment statutes we hold that Section 57-0605, NDRC 1943, in providing that the property of utilities shall be assessed 'with reference to the value thereof on the first day of January of that year' implies that the taxability and ownership of the property shall also be determined as of that day."

Appellee submits that, based upon these authorities, it is clear that a state has the power to determine and fix a specific date for the assessment of taxes for the next tax year. It is further submitted that if such personal property is located within the State on the date so fixed, and such property has a tax situs in the State on the assessment date, the owner of such property is liable for the payment of the personal property tax. This is true regardless of what such owner does with his property after the date the tax liability has become fixed. There is no constitutional requirement that be-

fore the owner of such property is liable for the property tax the property shall have a continuing situs in this State during the year for which the taxes are paid. Appellant cites no State or Federal authority for the proposition that before the tax in question may be levied the Appellant's property must continue to maintain a tax situs in this State during the year for which the taxes are being paid.

## II.

Appellant complains that since its property was removed to Maryland, and was in Maryland on the date fixed to determine tax liability for the next tax year in that state, that West Virginia should be required to excuse Appellant from paying the personal property tax assessed against it in West Virginia, and failure to do so violates "due process". Such a position is completely without legal merit or support. The following is found in 51 Am. Jur., § 450:

> "As a matter of constitutional power, a state which otherwise has the right to tax personal property is not deprived thereof by the fact that the property is subject to taxation, or that a tax has actually been paid thereon in another state for the same period. While the principle 'mobilia sequun tur personam' still expresses the prima facie rule of situs for taxation purposes of personal property, the right of the state in which personal property, whether tangible or intangible, has an actual or business situs to assess and collect taxes thereon is no longer open to question, *and the mere fact that personal property is subject to, or has actually been subjected to the payment of, taxes at the domicil of*

*the owner is not a bar to its taxation in another state where it has an actual situs.* It may well be that its taxation in the former state was unauthorized or even unconstitutional. *No state is bound to make its tax laws harmonize with those of other states.* While the courts are disposed, if possible, to construe taxing statutes of the state of the owner's domicil, even though phrased in broad terms, so as to exclude personalty located in another state under such circumstances as to have acquired a situs for taxation there, this is not a declaration of an exclusive right or power of taxation in the state of the actual situs or a prohibition of taxation by both the state of the situs and the state of the domicil. Is is generally agreed that no double taxation in a constitutional sense is involved in the taxation of the same personal property by different states for the same period, * * *." (Empasis supplied.)

In the present case the property, although owned by a Maryland corporation, had on July 1, 1961, a West Virginia situs for tax purposes. This fact is not disputed by Appellant. The fact that Appellant voluntarily chose to remove its property from West Virginia to Maryland, and thereby acquire a tax situs in Maryland on the day fixed for determining tax liability in that State, does not excuse Appellant from paying West Virginia property tax. Appellant's property had a tax situs in West Virginia and in Maryland on the dates fixed by the Legislatures of the two states for the fixing of tax liability; however, this fact does not constitute double taxation, and does not constitute a violation of the Fourteenth Amendment to the United States Constitution. In *Town of Cady* v. *Alexander Construction Company*, 12 Wis. 2d 236, 107 N.W. 2d

267, the question concerned the right to tax road construction equipment brought into Wisconsin for temporary use. In holding that such equipment could be taxed, the Court stated:

> "* * * However, other courts have found no such difficulty and have held construction machinery employed in construction work in a state other than that of the owner's residence may acquire a local situs in the state in which it is used. In Hamilton & Gleason Co. v. Emery County, 1930, 75 Utah 406, 285 P. 1006, the court sustained a personal property tax on construction equipment belonging to a Colorado corporation which was brought into Utah to do construction work on a railroad. The court rejected the argument that the property was in the state for temporary use and the owner intended to remove it as soon as the contract was completed. The property was brought into Utah sometime in 1925 and was removed by April 30, 1926. In The Arundel Corporation v. Sproul, 1939, 136 Fla. 167, 186 So. 679, a personal property tax was upheld on dredges and dredging equipment used by a nonresident in constructing dikes around Lake Okeechobee in Florida under a contract with the federal government. Its owner intended to return the property to Baltimore after completing the contract. The property was in Florida from June, 1934 to December, 1935. In Griggsby Construction Co. v. Freeman, 1902, 108 La. 435, 32 So. 399, 58 L.R.A. 349, blacksmith tools and commissary store goods kept as part of a construction outfit and owned by a nonresident were held taxable. The court reasoned that the property, because of its presence in the state for six months to construct a railroad bed, had acquired a situs because it was no longer in transit and had enjoyed the benefit and protection of the

laws of Louisiana. In Eoff v. Kennefick-Hammond Co., 1906, 80 Ark. 138, 96 S.W. 986, 7 L.R.A., N.S., 704, equipment of a nonresident owner used for constructing a road bed in Arkansas for a railroad was held subject to a personal property tax on the ground it was not in transit and was in the state chiefly, if not solely, for its owner's use and profit. The court reasoned the property for the time being was incorporated in the bulk of the property of the state and was distinguishable from other property in the state in no respect except the intention of the owner to remove it at some future time. See also Gromer v. Standard Dredging Co., 1911, 224 U.S. 362, 32 S.Ct. 499, 56 L.Ed. 801, wherein a dredge, tugboat, scows, and launch were held to have a situs in Puerto Rico while there to perform a contract, although owned by a Delaware dredging corporation; and North American Dredging Co. v. State, Tex. Civ. App. 1918, 201 S.W. 1065, wherein the court held that dredging and piping equipment constituting a part of a movable seagoing dredge--boat plant used in the performance of a dredging contract in Texas and pursuant to the business of its nonresident owner, had acquired taxable situs."

In the above discussed cases, if the property had been taken back to the state of the owner's domicile no doubt exists that such property could be taxed in the state of domicile, provided it was there on the date fixed for assessing taxes. There is no violation of the "due process clause" of the Federal Constitution based upon the fact, as appellant contends, that taxed property was not physically located in the state where the tax was levied for the entire period the tax was to be paid. It must be emphasized that the Appellant's prop-

erty enjoyed the protection and benefit of the West Virginia law while Appellant's property was located in this State, and Appellant was subject to paying its fair share of taxes. Appellant cannot complain that because he was not given an absolute guarantee that the Legislature would not change the dates fixed for assessing tax liability, his constitutional rights have been violated. Appellant desires this guarantee so as to allow Appellant to move his property in and out of West Virginia to obtain specific tax advantages.

If appellant brought his personal property into West Virginia after January 1, 1962, and it had acquired a tax situs in West Virginia on July 1, 1962, could appellant claim that his constitutional rights had been violated if appellant removed the property to Maryland prior to January 1, 1963? Appellee contends that appellant could not, since appellant's property had acquired a tax situs in West Virginia on July 1, 1962. The case now before this Court is no different than numerous others, where it has been held that once property has acquired a tax situs in a particular State the owner of such property must bear a fair share of the tax burden. This is true even though the property is only temporarily within the State, and is removed from the State prior to the time the tax is paid. Appellant asserts that personal property tax, once validly assessed, may not be avoided if the property loses its tax situs before the time for payment of the tax.

In upholding the action of the Pendleton County assessor, the West Virginia Supreme Court of Appeals in *The George F. Hazelwood Company* vs. *Pitsenbar-*

*ger*, 149 W. Va. ___, 141 S.E. 2d 314 (1965), said that:

> "It is well settled that a Legislature of a state has the power to fix the time at which property within its jurisdiction may be assessed. 51 Am. Jur., *Taxation*, Section 441: 84 C.J.S., *Taxation*, Section 60; 38 L.R.A., (N.S.) 856 et seq. Personal Property that has never been located within a state and over which the state has no power or control or which is only temporarily within the state cannot be assessed and taxed by such state, but if it has been located within the jurisdiction of the state for a period of time and used therein it may acquire a tax situs and be assessed on any day fixed by the Legislature and the tax is determined thereby, even though the property is removed from the state before the tax is due or even before the assessor actually entered his figures. 51 Am. Jur., *Taxation*, Section 442; *San Gabriel Valley Land & Water Co.* v. *Witmer Bros. Co.*, 96 Cal. 623, 29 P. 500, affirmed on rehearing, 31 P. 588, 18 L.R.A. 465. It has been specifically held that property may be assessed six months before the tax year. *Muskogee County* v. *United States*, 133 F. 2d 61. Tangible personal property which has acquired a tax situs retains such status until it is removed from the jurisdiction of the state in which it has acquired such tax situs, and the mere intention or determination to move such property is not sufficient to cause the state in which it was located at the time the tax situs was established and the property assessed, to lose its power to tax such property. It must be actually moved before the assessment date fixed by the Legislature. 84 C.J.S., *Taxation*, Section 115; *State* v. *Crown Central Petroleum Corp.*, (Tex.) 242 S.W. 2d 457."

* * *

"It has been held in a similar case that both the State of Texas, the domicile of the owner of the property, and the state of Louisiana, into which State the property was moved, could tax the personal property, it having acquired a tax situs and having been assessed in both states for the same year. *Grigsby Construction Company* v. *Freeman*, 108 La. 435, 32 So. 399. This question is discussed in 51 Am. Jur., *Taxation*, Section 450, wherein it is stated: 'As a matter of constitutional power, a state which otherwise has the right to tax personal property is not deprived thereof by the fact that the property is subject to taxation, or that a tax has actually been paid thereon, in another state for the same period.'

"The statutory assessment date determines the taxability of property and not the actual date the assessment is made. *United Telephone Mutual Aid Corporation* v. *State of North Dakota*, 87 N.W. 2d 54."

At another point the Court declared:

"It should be pointed out that the property in question was brought into West Virginia in 1960 and was not in West Virginia on December 31, 1959 when assessment was made on such property and therefore the Hazelwood Company was not assessed or taxed for its personal property in West Virginia during the year 1960. Therefore, it can be seen that the application of the assessment and tax laws in this state, before and after the 1961 amendment tended to equalize and compensate in relation to the taxes in question and was not an unjust burden as asserted by the appellee."

While not absolutely essential to the present case, it should be noted that some doubt still exists as to whether the tax levied on July 1, 1961, is for calendar year 1962, or for the fiscal year 1962-63. This doubt has arisen because West Virginia statutes provide that the real property tax lien attaches for taxes payable for the ensuing fiscal year. Since the 1961 amendment, a great deal of confusion has existed in this State as to the period for which the taxes are being paid. Of course, this is purely a local matter, and involves no federal question. It is appellee's contention that the Supreme Court of West Virginia in *The George F. Hazelwood Company* vs. *Pitsenbarger, supra,* did not decide this question.

Appellant relies upon *Union Refrigerator Transit Company* v. *Kentucky,* 199 U.S. 194, 50 L.Ed. 150, 26 S.Ct. 36, 4 Ann. Cas. 493 (1905), to support the position that West Virginia is prohibited from levying a tax upon appellant's tangible personal property which acquired a tax situs in West Virginia. The question before this court in *Union Refrigerator Transit Company* v. *Kentucky, supra,* concerned whether a corporation organized under the laws of Kentucky is subject to Kentucky taxation upon its tangible personal property permanently located in other states and employed there in carrying on its business. Certainly this is not the present situation. West Virginia did not attempt to levy taxes upon the tangible personal property located outside the boundaries of West Virginia, as was attempted in *Union Refrigerator Transit Company* v. *Kentucky supra,* and, therefore such case has no application to the present facts.

Another decision, which is particularly important, is *Muskogee County* v. *United States*, 133 F. 2d 61, cited by the West Virginia Supreme Court in deciding this matter. In that case it is specifically held that property may be assessed six months before the tax year. The following language is found therein:

> "Contrary to the judgment of the trial court in the Seber case, and the trial court here, we held, in accord with the state law, that the taxable status of all real property in Oklahoma was fixed as of the assessment date which is January 1st of each year for the ensuing fiscal and taxable year beginning July 1st. Consequently, all the lands in question were assessable because non-exempt on January 1, 1936, and were taxable by the state for the ensuing fiscal and taxable year beginning July 1, 1936, although declared exempt from state taxation by the Act of June 20, 1936. By this concession, we accorded proper respect to the state scheme of ad valorem taxation as judged by state law. * * *"

This Federal decision stands for the proposition that a State Legislature has the authority to fix the tax assessment date six months before the actual collection and use of the tax.

## CONCLUSION

Appellee respectfully submits that there has been no violation of the "due process" clause of the United States Constitution on the facts presented by this record. This is simply a taxation by West Virginia of personal property having a tax situs in West Virginia. The fact that appellant's property acquired a new tax situs in Maryland, and was taxed again, does not give rise to a Federal question. Appellee respectfully requests that appellant's request for appeal be denied.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1965

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THE GEORGE F. HAZELWOOD COMPANY,
A MARYLAND CORPORATION,

*Appellant,*

vs.

J. STANLEY PITSENBARGER, ASSESSOR
OF PENDLETON COUNTY, WEST VIRGINIA,

*Appellee,*

---

On Appeal From The Supreme Court of Appeals
Of The State of West Virginia

---

# REPLY BRIEF FOR APPELLANT IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS

---

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No. 567

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1965

THE GEORGE F. HAZELWOOD COMPANY, A MARYLAND CORPORATION,

*Appellant,*

vs.

J. STANLEY PITSENBARGER, ASSESSOR OF PENDLETON COUNTY, WEST VIRGINIA,

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## INDEX


TABLE OF AUTHORITIES - - - ii

INTRODUCTORY - - - - - - - - 1

ARGUMENT - - - - - - - - - - 1

CONCLUSION - - - - - - - - - 7

APPENDIX "A" - - - - - - - - 9

APPENDIX "B" - - - - - - - - 11

## TABLE OF AUTHORITIES

### Cases

**Brinkerhoff-Faris Trust Co. v. Hill,** 281 U.S. 673, 680, 50 S.Ct. 451, 74 L.Ed. 1107, 1113 (1929) - - - - - - - - 5

**Central Railroad Company of Pennsylvania v. Pennsylvania,** 370 U.S. 607, 611, 612, 82 S.Ct. 1297, 8 L.Ed. 2d 725 (1962) - - - - - - - - - - - - 7

**Fox River Paper Co. v. Railroad Commission,** 274 U.S. 651, 655, 47 S.Ct. 669, 71 L.Ed. 1279, 1283 (1927) - - - 5

**Lynumn v. Illinois,** 368 U.S. 908, 82 S.Ct. 190, 7 L.Ed.2d 128 (1961); **Id.,** 370 U.S. 933, 82 S.Ct. 1576, 8 L.Ed.2d 805 (1962); **Id.,** 372 U.S. 528, 83 S.Ct. 917, 9 L.Ed.2d 922 (1963) - - - - - - 3

**The George F. Hazelwood Company v. Pitsenbarger,** 149 W.Va. ——, 141 S.E.2d 314, 317 (1965) - - - - - 4

## Statutes

**Alaska Statutes** Sec. 29.10.396 - - 5

**Arizona Revised Statutes, 1956,** Sec. 42-221 - - - - - - - - - - - 6

**Arkansas Statutes of 1947,** Sec. 13-102, 103 - - - - - - - - - - - - 6

**California Assessment and Taxation Code,** Sec. 405 - - - - - - - - - 6

**Florida Statutes,** Sec. 193.11 - - - 6

**Georgia Code of 1933,** Sec. 92-6202 - 6

**Revised Laws of Hawaii of 1955,** Title 16, Sec. 128-3 - - - - - - 6

**Revised Statutes of Maine,** 1954, Ch. 91-A, Sec. 3 - - - - - - - - - 6

**Montana Revised Codes of 1947,** Sec. 84-406 - - - - - - - - - - 7

## INTRODUCTORY

J. Stanley Pitsenbarger, Assessor of Pendleton County, West Virginia, appellee herein, has timely filed a printed "Brief for the Appellee in opposition to Jurisdictional Statement." The only provision made by the Revised Rules of the Supreme Court of the United States for reply by an appellee to a jurisdictional statement filed by an appellant is that which is set forth in Rule 16, "Motions to Dismiss or Affirm." Therefore, appellant will reply thereto on the theory that the Brief filed by appellee constitutes a motion to dismiss and a note of argument in support thereof.

## ARGUMENT

Rule 16 (1) (a) of the Revised Rules of this Court provides that "The court will receive a motion to dismiss any appeal on the ground that the appeal is not within the jurisdiction of this court because not taken in conformity to statute or to these rules." No contention is made by counsel for the appellee that this Court lacks jurisdiction under 28 U.S.C.A. sec. 1257 (2) and sec. 2101 (c), which were cited and relied on by appellant in its Jurisdictional Statement heretofore filed, or that appellant has in any way failed to comply with the Revised Rules of this Court.

Rule 16 (1) (b) provides that: "The court will receive a motion to dismiss an appeal

from a state court on the ground that it does not present a substantial federal question; or that the federal question sought to be reviewed was not timely or properly raised, or expressly passed on; or that the judgment rests on an adequate non-federal basis." No contention is made by counsel for the appellee that the federal constitutional question involved in this appeal was not timely or properly raised or expressly passed on, or that such question is not substantial, or that the judgment rests on an adequate non-federal basis. On the contrary, appellee expressly admits all of "the facts as set forth in the second section of appellant's jurisdictional statement entitled 'Jurisdiction'." (See **Brief for Appellee,** p. 1) Further, the headnote to the fourth section of appellee's Brief expressly states "The questions are substantial," (**Id.,** p. 6), and no mention whatsoever is made of any possible non-federal basis for the judgment of the Supreme Court of Appeals of West Virginia in reversing the judgment of the Circuit Court of Pendleton County in this case. However the appellee does say, in the Conclusion of his Brief, that: "The fact that appellant's property acquired a new tax situs in Maryland, and was taxed again, does not give rise to a Federal question." (**Id.,** p. 21)

On the other hand, the Circuit Court of Pendleton County, West Virginia, expressly based its reversal of the ruling of the County Court on the legal conclusion that the action

of the appellee in assessing 1962 taxes against appellant's tangible personal property, on these facts, was "in violation of the due process clause of the 14th Amendment to the Constitution of the United States." (See **Jurisdictional Statement,** Appendix "A" p. 18) This federal constitutional issue was briefed and argued by appellant in the Supreme Court of Appeals of West Virginia, and, although it was not specifically mentioned in the opinion (See **Jurisdictional Statement,** Appendix "B" pp. 20-32) the Supreme Court of Appeals reversed the judgment of the Circuit Court and has subsequently certified to this Court as follows:

> ". . . that **decision of the federal constitutional issue** raised in Pages 13-20 inclusive of the printed brief filed herein by Defendant in Error and in Pages 3-15 inclusive of the Petition for Rehearing and Note of Argument filed herein by Defendant in Error, to-wit: **whether or not the taxes sought to be imposed by the Plaintiff in Error on the Defendant in Error for the year 1962 constitute a taking of property of the Defendant in Error without due process of law in violation of the 14th Amendment to the Constitution of the United States, was necessary to our judgment in the above styled proceeding."** See Appendix "B," **infra** (emphasis supplied).

This certificate may properly be considered by this Court. **Lynumn v. Illinois,** 368 U.S.

908, 82 S.Ct. 190, 7 L.Ed.2d 128 (1961); **Id.**, 370 U.S. 933, 82 S.Ct. 1576, 8 L.Ed.2d 805 (1962); **Id.**, 372 U.S. 528, 83 S.Ct. 917, 9 L.Ed.2d 922 (1963)

Appellee also expressly admits the allegations of fact set forth in the "Statement of Facts" included in appellant's Jurisdictional Statement (pp. 5, 6) except for the allegation that the taxes here in issue were for the calendar year 1962 (see **Brief for Appellee,** pp. 5 and 19). This last allegation of fact is not denied, but counsel for the appellee say that "**doubt still exists** as to whether the tax levied on July 1, 1961, is for the calendar year 1962 or for the fiscal year 1962-63." **Ibid.** (emphasis supplied) We submit that this question was expressly decided once and for all by the Supreme Court of Appeals in this very case, when it said:

> "... after the Legislature amended the assessment statute in 1961 and placed it on a fiscal year basis, that is, from July 1 until June 30, **the tax year still remained on a calendar year basis,** in which manner property, both personal and real, had been assessed and taxed for many years ..." **The George F. Hazelwood Company v. Pitsenbarger,** 149 W.Va. ——, 141 S.E.2d 314, 317 (1965); Jurisdictional Statement, Appendix "B", pp. 25-26 (emphasis supplied)

Such a decision by the highest court of the State of West Virginia, construing a new

amendment to a West Virginia statute, is not subject to review by this Court. See **Brinkerhoff-Faris Trust Co. v. Hill,** 281 U.S. 673, 680, 50 S.Ct. 451, 74 L.Ed. 1107, 1113 (1929); **Fox River Paper Co. v. Railroad Commission,** 274 U.S. 651, 655, 47 S.Ct. 669, 71 L.Ed. 1279, 1283 (1927)

The sole basis for appellee's Brief appears to be a contention that the Supreme Court of Appeals of West Virginia was correct on the merits when it reversed the judgment of the Circuit Court of Pendleton County. We submit that the ruling of the Supreme Court of Appeals was in direct conflict with the decisions of this Court in the cases cited in our Jurisdictional Statement and is therefore clearly wrong. Further, as hereinafter stated, the issue presented here directly affects many states and indirectly, at the least, affects citizens of all of the states, and for that reason is not only substantial but is also of public importance.

Some state property tax statutes do not specify the tax year for which ad valorem taxes on tangible personal property are imposed. Most states, like Maryland (see **Jurisdictional Statement**, p. 9), use a January 1st annual assessment date and provide, by statute, administrative regulation or judicial decision, that the taxes assessed are for the calendar year in which the assessment is made. (See, e.g. **Alaska Statutes,** Sec. 29.10.396;

**Arkansas Statutes of 1947,** Sec. 13-102, 103; **Id.** Sec. 84-426; **Florida Statutes,** Sec. 193.11; **Georgia Code of 1933,** Sec. 92-6202; **Revised Laws of Hawaii of 1955,** Title 16, Sec. 128-3) So long as the assessment date for any state is within the tax year, the federal constitutional problem presented by this case cannot arise, since, in order to come within the terms of the state assessment statute, the tangible personal property involved must necessarily be within the taxing state at some time within the tax year, thereby receiving at least some degree of benefit and protection from the laws of the taxing state during the year for which the taxes are imposed.

However, not only West Virginia but a substantial number of other states have taxing statutes which place the assessment date outside the tax year. Arizona, for example, uses a January 1st annual assessment date, but the taxes are imposed for the fiscal year beginning the succeeding July 1st (**Arizona Revised Statutes,** 1956, Sec. 42-221). California uses the 1st Monday in March of each year as the assessment date, but the taxes are for the fiscal year beginning the succeeding July 1st (**California Assessment and Taxation Code,** sec. 405). The assessment date in Maine is April 1st but the taxes assessed are for the ensuing fiscal year **(Revised Statutes of Maine, 1954,** Ch. 91-A, Sec. 3). Montana uses the 1st Monday in March as its assessment date for taxes for the fiscal year beginning the follow-

ing July 1st (**Montana Revised Codes of 1947,** Sec. 84-406). Similar provisions are found in the tax statutes of New Jersey, Oklahoma and Oregon. None of these statutes is unconstitutional per se, but when any of these statutes is applied to movable tangible personal property, especially that owned by non-residents of the taxing state, it is manifest that the danger of multiple taxation and consequent unjust tax burden is very great. Moreover, there will be many instances like the situation in the case at bar, where a state will seek to tax tangible personal property of a resident of another state for a tax year during which such property receives from its laws none of "the opportunities, benefits and protection which 'due process' demands as pre-requisite for taxation." **Central Railroad Company of Pennsylvania v. Pennsylvania,** 370 U.S. 607, 611, 612, 82 S.Ct. 1297, 8 L.Ed.2d 720, 725 (1962)

## CONCLUSION

In conclusion, counsel for the appellant would like to re-iterate their sole contention herein, to-wit: that the State of West Virginia did not have jurisdiction, under the "due process" clause of the 14th Amendment to the Constitution of the United States, to impose a tax for the calendar year 1962 on tangible personal property of the appellant, a Maryland corporation, which was not in the State of West Virginia at any time during that

year. To the extent that Chapter 11, Article 3, Section 1 of the Code of West Virginia, as amended by Chapter 142 of the Acts of the West Virginia, regular session, 1961, was construed and applied to impose such a tax on the appellant, on these facts, we submit that such statute is repugnant to and invalid under the federal constitution.

This is the only issue presented by this appeal, and this issue had never been presented to or decided by any court, state or federal, until the decision here appealed from. The fact that Maryland also taxed this same property for the same calendar year illustrates the injustice and hardship which can result when states exceed their jurisdiction in this regard, but appellant's case in no way depends on the fact that such tax was imposed by Maryland. Moreover, as above stated, the federal question presented is substantial and of public importance. Therefore appellee's motion to dismiss should be refused, probable jurisdiction should be noted and this appeal should be given plenary consideration by this Court.

Respectfully submitted,

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Henry Clay Hart, Jr.
126 East Street
Keyser, West Virginia
Attorneys for the Appellant

## APPENDIX "A"

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 11th day of October, 1965, the following order was made and entered, to-wit:

In the Matter of The George F. Hazelwood Company, a corporation, Plaintiff Below, Defendant in Error

vs. 12360

J. Stanley Pitsenbarger, Assessor Pendleton County, Defendant Below, Plaintiff in Error

This day came the George F. Hazelwood Company, Defendant in Error, by Joseph A. Blundon, one of its attorneys, and requested the Court that a certificate be issued stating whether or not the Federal Constitutional issue raised in the brief of defendant in error and in the Petition for Rehearing filed by defendant in error, to-wit: whether or not the taxes sought to be imposed by the plaintiff in error on the defendant in error for the year 1962 constitute a taking of property of the defendant in error without due process of law in violation of the 14th Amendment to the

Constitution of the United States, was necessary to the judgment of this Court in the above styled proceeding, and, the Court being of opinion that such Federal Constitutional issue was decided and was necessary to such judgment, it is ordered that the President of this Court be authorized to issue and execute such certificate.

A True Copy

Attest: /s/ Kenneth E. Hines

Clerk Supreme Court of Appeals

## APPENDIX "B"

### In The Supreme Court of Appeals of West Virginia

In the Matter of THE GEORGE F. HAZELWOOD COMPANY, a corporation, Plaintiff Below, Defendant in Error,

vs. No. 12360

J. STANLEY PITSENBARGER, ASSESSOR OF PENDLETON COUNTY, Defendant Below, Plaintiff in Error,

## CERTIFICATE

In response to a request by counsel for The George F. Hazelwood Company, Defendant in Error in the above styled proceeding lately pending in this Court and now pending in the Supreme Court of the United States, we hereby certify that decision of the federal constitutional issue raised in Pages 13-20 inclusive of the printed brief filed herein by Defendant in Error and in Pages 3-15 inclusive of the Petition for Rehearing and Note of Argument filed herein by Defendant in Error, to-wit: whether or not the taxes sought to be imposed by the Plaintiff in Error on the Defendant in Error for the year 1962 constitute a taking of

property of the Defendant in Error without due process of law in violation of the 14th Amendment to the Constitution of the United States, was necessary to our judgment in the above styled proceeding.

/s/ Chauncey Browning
President of the Supreme Court of Appeals of West Virginia

Attest:
/s/ Kenneth E. Hines
Clerk

END